Supreme Court, U.S.
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No. 02-1016

In the Supreme Court of the United States

LEE M. TILL AND AMY M. TILL,
Petitioners,

v.

SCS CREDIT CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

What is the rate of interest a secured creditor is entitled to receive during the life of a Chapter 13 bankruptcy plan?

CORPORATE DISCLOSURE STATEMENT

Respondent, SCS Credit Corp., in compliance with Supreme Court Rule 29.6, states that it has no corporate affiliations.

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STATEMENT OF THE CASE

SCS Credit Corp., respondent, accepts petitioners' Statement of the Case, except SCS Credit Corp. never argued that it was, per se, entitled to its contract rate of interest. Petitioners' Petition for Writ of Certiorari at p. 3. Instead, SCS Credit Corp. stated that it was entitled to its current rate of interest for loans similar to the one previously made to the debtors. The current interest rate of 21% happens to equal the contract interest rate.

SUMMARY OF ARGUMENT

The respondent, SCS Credit Corp., prefers that this Court reject petitioners' Petition for Writ of Certiorari. First, the Seventh Circuit decision of *In re Till*, 301 F.3d 583 (7th Cir. 2002) is a correct interpretation of 11 U.S.C. §1325(a)(5)(B)(ii). Second, SCS Credit Corp. does business only in the Seventh Circuit territory. Since SCS Credit Corp. prevailed in the Seventh Circuit, it has nothing to gain if this Court grants the Petition. In fact, if this Court grants the Petition, then SCS Credit Corp. will have to expend considerable resources to litigate this matter further. Nevertheless, since there is a conflict among the circuits on how to interpret 11 U.S.C. §1325 (a)(5)(B)(ii) and since the issue involved is of substantial importance, this Court should grant the Petition if it has the time to address the issue.

ARGUMENT

In a Chapter 13 bankruptcy proceeding, 11 U.S.C. §1325(a)(5)(B)(ii) requires the debtor to propose a plan which will provide the secured creditor with payments over the term of the plan that will equal the present value of the allowed secured claim. Failure of the plan to comply with this present value requirement gives the secured creditor grounds to object to confirmation of the plan. *Matter of Smithwick*, 121 F.3d

211, 213 (5th Cir. 1997). In Chapter 11 and Chapter 12 bankruptcy proceedings, 11 U.S.C. §1129(b)(2)(A)(i)(II) and 11 U.S.C. §1225(a)(5)(B)(ii), respectively, contain the concept of present value. Courts interpreting these virtually identical statutes requiring present value routinely agree that the concept has the same meaning regardless of whether a debtor is in Chapter 11, Chapter 12, or Chapter 13. *In re Corley*, 83 B.R. 848, 851 (Bankr. S.D. Ga. 1988); *Matter of Southern States Motor Inns, Inc.*, 709 F.2d 647, 652 n.6 (11th Cir. 1983). In *U.S. v. Arnold*, 878 F.2d 925, 928 (6th Cir. 1989) the court said "[a]s §1225(a)(5)(B) and §1325(a)(5)(B) are identical, we hold that the provisions should be similarly construed."

Ten circuits of the United States Courts of Appeals have reviewed the concept of present value in a bankruptcy plan. All ten circuits have held that present value means the secured creditor is entitled to a "market rate" of interest. *In re Valenti*, 105 F.3d 55, 64 (2nd Cir. 1997); *General Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 66 (3rd Cir. 1993); *United Carolina Bank v. Hall*, 993 F.2d 1126, 1130 (4th Cir. 1993); *Matter of Smithwick*, 121 F.3d 211, 214 (5th Cir. 1997); *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427, 431 (6th Cir. 1982); *Koopmans v. Farm Credit Serv. of Mid-America, ACA*, 102 F.3d 874, 875 (7th Cir. 1996); *In re Fisher*, 930 F.2d 1361, 1364 (8th Cir. 1991); *In re Fowler*, 903 F.2d 694, 697 (9th Cir. 1990); *In re Hardzog*, 901 F.2d 858, 860 (10th Cir. 1990); *Matter of Southern States Motor Inns, Inc.*, 709 F.2d 647, 652-53 (11th Cir. 1983).

Although all of the aforementioned circuit courts have held that a secured creditor is entitled to the market rate of interest in order to receive the present value of its claim, there is disagreement about the method to use to determine the market rate of interest. The 2nd Circuit held that the market rate of interest under 11 U.S.C. §1325(a)(5)(B)(ii) is the

United States Treasury Bill rate (T-Bill) plus an additional risk premium of 1 to 3 interest points. This is the formula approach. *In re Valenti*, 105 F.3d at 64. *In re Fowler*, the leading 9th Circuit decision, has also adopted the formula approach, but it did not place an artificial cap on the number of interest points to be added to the base rate of interest. Instead, the *Fowler* court, citing 5 Collier On Bankruptcy §1225.03[4][c], at 1225-23, said "that the use of a formula should be only a presumption, and that courts should always allow the parties to introduce evidence of market rates to rebut the presumption." *In re Fowler* 903 F.2d 694, 698 (9th Cir. 1990).

The other eight circuits which have addressed the concept of present value and how to determine the market rate of interest have either explicitly or implicitly adopted the "coerced loan" approach. *General Motors Acceptance Corp. v. Jones*, 999 F.2d at 68 (3rd Cir. 1993); *United Carolina Bank v. Hall*, 993 F.2d at 1130 (4th Cir. 1993); *Matter of Smithwick*, 121 F.3d at 214 (5th Cir. 1997); *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d at 429 (6th Cir. 1982); *United States v. Arnold*, 878 F.2d at 928 (6th Cir. 1989); *Koopmans v. Farm Credit Serv. of Mid-America, ACA*, 102 F.3d at 875 (7th Cir. 1996); *In re Fisher*, 930 F.2d at 1364 (8th Cir. 1991); *In re Hardzog*, 901 F.2d at 860 (10th Cir. 1990); *Matter of Southern States Motor Inns, Inc.*, 709 F.2d at 652 n.7 (11th Cir. 1983). Courts which have adopted the coerced loan approach view a bankruptcy reorganization plan as effectively coercing the creditor to extend a new loan to the debtor. According to the 3rd Circuit, because creditors are forced to extend a loan to the debtor for the duration of the bankruptcy plan, the creditor is entitled to the interest rate it would charge at the time of the effective date of the plan for a loan of similar character and duration. *General Motors Acceptance Corp. v. Jones*, 999 F.2d at 70. The 7th Circuit

adopted the coerced loan approach in *Koopmans v. Farm Credit Serv. of Mid-America, ACA,* 102 F.3d 874 (7th Cir. 1996). The *Koopmans* court had to decide what interest rate would give a secured creditor its present value in a reorganization plan. The *Koopmans* court said "we now hold that the creditor is entitled to the rate of interest it could have obtained had it foreclosed and reinvested the proceeds in loans of equivalent duration and risk." *Koopmans* 102 F.3d at 875. The *Till* opinion reaffirms the *Koopmans* holding that the interest rate must be the rate the creditor would obtain at the time of confirmation for a loan of similar duration and risk. *In re Till*, 301 F.3d at 592. In order to promote judicial economy, the *Till* court also adopted a procedural rule called "the rebuttable presumption rule." *In re Till,* 301 F.3d 592-93. This rule, which the 3rd and 5th circuits have also adopted, simply says that there is a presumption that the contract rate of interest that the debtor voluntarily agreed to pay is the creditor's current interest rate for the type of loan previously made to the debtor. Either the creditor or debtor may present evidence that the creditor currently receives either a higher or lower interest rate for similar loans. *In re Till,* 301 F.3d 592-93. *General Motors Acceptance Corp. v. Jones,* 999 F.2d 63, 70-71 (3rd Cir. 1993), *Matter of Smithwick,* 121 F.3d 211, 214-15 (5th Cir. 1997). Contrary to the assertions of the petitioners, the decision of *In re Till* 301 F.3d 583 is a correct interpretation of 11 U.S.C. §1325. If the Petition for Writ of Certiorari is granted, SCS Credit Corp. will make a more elaborate explanation of its position and its opposition to the petitioners' interpretation of 11 U.S.C. §1325.

Although the decision of *In re Till* is correct, undoubtedly there is disagreement among the circuit courts as to the proper method to determine the market rate of interest in a Chapter 13 plan. In fact, there is now a split of authority on this issue

in the 6th Circuit. In *U.S. v. Arnold*, 878 F.2d 925, 930 (6th Cir. 1989), the court ruled "we hold that where a 'cram-down' occurs under §1325(a)(5)(B) and a creditor is forced to write down a portion of its note, a creditor is entitled to receive its current market rate on the 'new loan'" (emphasis added). The *Arnold* court was clearly focusing on the interest rate a secured creditor would currently charge for a loan similar to the loan previously made to the debtor. However, the recent 6th Circuit decision of *In re Kidd*, 315 F.3d 671, 678 (6th Cir. 2003) held that the interest rate could be determined by looking at conventional market rates of interest even though the creditor was an unconventional or non-prime lender. Judge Simpson dissented, arguing that conventional market rates of interest were not relevant since the debtor could not qualify for such a loan. 315 F.3d at 679. The *Kidd* decision is obviously in conflict with prior 6th Circuit decisions and the Seventh Circuit decision of *Till*.

The interest rate paid on a secured claim in a Chapter 13 plan is clearly of substantial importance to debtors and creditors alike. If the interest rate is not determined correctly, one of the parties will suffer financially. Only this Court knows if the issue is of enough importance to justify the use of some of its limited resources to resolve the conflict among the circuit courts.

CONCLUSION

The Seventh Circuit *Till* decision is correct. If the Court has the time to resolve the issue on a nationwide basis, it should do so. If the Court does not have the time, then justice in this case will have prevailed. Creditors and debtors in the Seventh Circuit and the majority of other circuits will earn and pay, respectively, the proper rate of interest in Chapter 13 plans.

Respectfully submitted,

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